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No. 98-85

In The

Supreme Court of the United States

October Term, 1998

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,

Appellants,

vs.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, AND PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF APPELLANTS

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INTERESTS OF *AMICI CURIAE*

With the consent of the parties, the Brennan Center for Justice at New York University School of Law; the Asian American Legal Defense and Education Fund, Inc.; and the Puerto Rican Legal Defense and Education Fund, Inc. submit this brief *amici curiae* in support of Defendants-Appellants.[1] Letters of consent are on file with this Court.

The Brennan Center for Justice at New York University School of Law is a nonpartisan institute dedicated to a vision of inclusive and effective democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice William Brennan, Jr. To that end, the Center has created a Democracy Program, which undertakes projects that promote equal representation and other core ideals of democratic government. The Center takes an interest in this case because of its implications for the effective representation of minority populations and submits this brief in the hope of providing a workable framework for deciding *Shaw* actions.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a nonprofit organization that protects the legal rights of Asian Americans. AALDEF has represented the Asian American community in numerous cases and administrative proceedings under the Voting Rights Act. The Court's decision in *Shaw v. Reno* has been interpreted in ways that have limited the rights of Asian Americans to

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1. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici*, has contributed monetarily to the preparation and submission of this brief.

participate fully in the political process. The decision below is another clear example of how the distorting lens of *Shaw* has been used to depict the permissive consideration of communities of interest as the impermissible consideration of race. AALDEF takes an interest in this case because the continued viability of electoral participation is threatened by this misapplication of the Equal Protection Clause.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national civil rights organization that exists to ensure that every Puerto Rican as well as other Latinos are guaranteed equal opportunities to succeed. Through litigation, advocacy, and education, PRLDEF has initiated hundreds of cases to combat discrimination in significant areas such as voting, education, housing, and language rights. It is of paramount importance to PRLDEF that its constituency be afforded full access to the political process. PRLDEF takes an interest in this case because the district court's interpretation of *Shaw v. Reno*, if allowed to stand, threatens to deny PRLDEF's constituency the opportunity to participate fully and effectively in the political process by joining with non-Latinos in common communities of interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), and its progeny,[2] efforts to enhance the political power of racial minorities by using race as the dominant and controlling factor in creating "majority-minority" legislative districts violate the Equal Protection Clause of the Fourteenth Amendment. While

2. *See, e.g., Lawyer v. Department of Justice*, 117 S. Ct. 2186 (1997); *Abrams v. Johnson*, 117 S. Ct. 1925 (1997); *Bush v. Vera*, 517 U.S. 952 (1996) (plurality opinion); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *United States v. Hays*, 515 U.S. 737 (1995).

amici share the *Shaw I* Court's aspiration for a nation in which race does not play a divisive role, *amici* fear that *Shaw I* unfairly denies minority voters the opportunity to organize themselves as a community sharing actual interests in the real world of North Carolina politics.

Whatever the wisdom of *Shaw I*, however, this case goes far beyond outlawing race as a permissible community of interest. This case casts doubt on the ability of North Carolina to draw district lines that recognize *non-racial* communities of interest, such as those linked by political affiliation, inner-city residence, and proximity to transportation corridors, solely because in today's America those communities of interest often correlate with membership in a racial minority.

The district court below summarily invalidated a non-majority-minority congressional district, ignoring and mischaracterizing sworn assertions that its shape and racial composition were traceable not to an overriding concern with race but to a desire to recognize political affiliation, inner city residence, and residence in close proximity to a highway as legitimate non-racial communities of interest warranting representation in Congress. If the district court's decision is affirmed, minority voters will be doubly harmed. Not only will *Shaw I* deprive them of the ability to be linked by an immensely important community of interest — membership in a minority race — but, alone among American voters, they will be denied the ability to be linked by crucial non-racial communities of interest, merely because those interests often overlap with race. Surely, the Fourteenth and Fifteenth Amendments were not intended to create such a second-class political status.

To avoid this unfair and unintended consequence, this Court should reaffirm that *Shaw I* imposes an extremely demanding burden on plaintiffs claiming that a state has segregated voters

on the basis of race in violation of the Equal Protection Clause. Plaintiffs in a *Shaw I* action cannot rest on evidence that race was one of several motivating factors in choosing district lines but instead must prove that race for its own sake was the state's "dominant and controlling" rationale in drawing district lines before strict scrutiny will apply. *See* Point I.A.

In Point I.B., *amici* suggest that *Shaw I* and its progeny do not provide adequate guidance to courts attempting to apply this standard and should therefore be reconsidered. But in the event that the Court adheres to *Shaw I*, *amici* propose an analytical framework that would allow courts to decipher the legislature's predominant intent, while preserving *Shaw I*'s demanding burden of proof. *See* Point I.C.

Amici demonstrate in Point II that, under this framework, Plaintiffs could not carry their demanding burden. Plaintiffs' evidence of District Twelve's shape and racial composition was insufficient to establish even a *prima facie* case of liability. And even if Plaintiffs had raised an inference of impermissible racial intent, Defendants fully rebutted that inference with unchallenged proof that race was not the state's predominant consideration. That unrebutted evidence shows that North Carolina drew district boundaries with the hope of providing representation for actual communities of interest defined by voting patterns, inner-city residence, and proximity to Interstate 85. Inexplicably, the district court ignored or mischaracterized most of this evidence. *See* Point II.A.

Finally, as *amici* demonstrate in Point II.B., the district court erred in denying Defendants' motion for summary judgment and in granting Plaintiffs' motion for summary judgment. In so doing, the court effectively shifted the burden of persuasion to Defendants and transformed *Shaw I*'s intent

standard into a far less burdensome impact test. The Court should therefore reverse the decision below, or at the very least vacate and remand the case for fact-finding on the issue of intent and, if intent is proven, for application of strict scrutiny.

ARGUMENT

I.

COURTS DECIDING *SHAW* CLAIMS MUST RECOGNIZE PLAINTIFFS' UNUSUALLY "DEMANDING" EVIDENTIARY BURDEN.

A. Claims of Unconstitutional Gerrymandering Under *Shaw* Require Proof That Race Was the "Dominant and Controlling" Consideration in Drawing District Lines.

Plaintiffs in an action under *Shaw I* face an extremely "demanding" evidentiary burden. *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring). They cannot trigger strict scrutiny merely by showing that a racially discriminatory purpose was one factor in government decision-making. Rather, plaintiffs must show that race, standing alone, was the State's "dominant and controlling" consideration. *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) ("*Shaw II*") (citations omitted); *see Miller*, 515 U.S. at 916 (plaintiffs must prove "race was the predominant factor . . . [by showing] that the legislature subordinated traditional race neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests"); *Bush v. Vera*, 517 U.S. 952, 959 (1996) (plurality opinion).

Under this demanding standard, mere evidence of the racial impact of districting cannot sustain a *Shaw I* claim.[3] "In the rare

3. *See Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2195 (1997) ("[W]e have never suggested that the percentage of black residents (Cont'd)

case," the effects of governmental action may be so overwhelming that the racial purpose of the action is clear. *Miller*, 515 U.S. at 913 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). But "[i]n the absence of a pattern as stark as those in *Yick Wo* or *Gomillion*, 'impact alone is not determinative, and the Court must look to other evidence of race-based decisionmaking.' " *Miller*, 515 U.S. at 914 (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). That evidence must command the conclusion that the legislature elevated race above all other considerations in drawing a challenged district's lines.[4]

B. *Shaw* Offers No Guidance to Courts Deciding Whether Plaintiffs Have Carried Their Burden.

Legislatures drawing a district's lines, and courts reviewing apportionment challenges under *Shaw I*, need a standard that clearly specifies when race may be legitimately considered. Unfortunately, *Shaw I* and its progeny create an unstable legal standard in a context that cries out for predictability. On the one hand, states are permitted to redistrict "with consciousness

(Cont'd)
in a district may not exceed the percentage of black residents in any of the counties from which the district is created, and have never recognized similar racial composition of different political districts as being necessary to avoid an inference of racial gerrymandering . . . .").

4. In this regard, North Carolina's awareness that its districting program would place a substantial black minority in District Twelve does not render the district constitutionally suspect. *See Shaw* II, 517 U.S. at 905 ("[A] legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts."); *Miller*, 515 U.S. at 916 ("Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.").

of race," *Vera*, 517 U.S. at 958 (plurality opinion); *Miller*, 515 U.S. at 916, and indeed must do so in order to avoid running afoul of the Voting Rights Act, *see Vera*, 517 U.S. at 991-92 (O'Connor, J., concurring). On the other hand, race may not be "the predominant factor motivating the legislature's decision." *Miller*, 515 U.S. at 916. Legislatures are therefore left with no practical guidance as to where to draw the line between permissible and impermissible uses of race.

For that reason alone, the *Shaw* line of cases should be reconsidered. The razor-thin distinctions between being aware of race, being motivated by race, and more importantly, being predominantly motivated by race, are so ephemeral that resolution of such questions may well be beyond the competence not only of legislatures but of courts. *See Miller*, 515 U.S. at 916 ("The distinction between being aware of racial considerations and being motivated by them may be difficult to make.").

Shaw I, therefore, places both state legislatures and district courts in a quandary. Without concrete guidance as to how and when race may be considered, and faced with significant pressure both to consider race and not to consider race, states may be forced to cede their redistricting responsibilities to the unpredictable fact-finding procedures of the federal courts. But the *Shaw* cases offer the courts no better idea about how to distinguish unconstitutional districts. For this reason, *amici* urge the Court to reconsider the continued propriety of *Shaw I*.

C. If the Court Declines to Reconsider *Shaw*, the Court Should Provide a Workable Framework for *Shaw* Actions That Preserves Plaintiffs' Demanding Evidentiary Burden.

Shaw I creates an unmanageable standard of liability, requiring a quixotic search for a "predominant" legislative

motive that may pose insuperable practical problems for conscientious fact-finders. If this Court remains committed to *Shaw I*, however, the Court must provide district courts with precise guidance as to how to resolve the difficult factual question of whether race was the controlling factor in drawing district lines. Moreover, to ensure that district courts do not simply presume unconstitutionality when faced with districts they consider "oddly shaped" or "too black," the framework this Court provides must preserve the demanding burden of proof imposed on *Shaw I* plaintiffs.

To achieve these ends, the Court might consider the following framework: In the absence of direct evidence that the state was predominantly motivated by race, plaintiffs would be required to provide compelling circumstantial evidence that the challenged district *both* flunked a functional compactness test *and* seriously distorted racial demographics in order to raise an inference that race dominated the districting process. If plaintiffs provided such powerful circumstantial evidence, the production burden would then shift to defendants to offer legitimate nondiscriminatory reasons for district boundaries. Defendants' production of sworn evidence that non-racial considerations dominated the districting process would shift the production burden back to plaintiffs. Whether plaintiffs were able to establish a *prima facie* case, or to rebut the state's evidence would, therefore, be questions of law for the court, since they would be questions about satisfaction of the production burden. At all times, the ultimate and demanding burden of persuasion on the issue of predominant racial purpose would remain with plaintiffs. *See Abrams v. Johnson*, 117 S. Ct. 1925, 1931 (1997); *Shaw II*, 517 U.S. at 905.

1. The Court Should Impose a Demanding Production Burden Before Allowing District Courts to Infer a Predominantly Racial Purpose From Circumstantial Evidence.

For three reasons, courts should require *Shaw I* plaintiffs to meet a demanding production burden before inferring a predominantly racial purpose from merely circumstantial evidence. First, this Court has already held that plaintiffs face a demanding burden of persuasion in *Shaw I* actions. Plaintiffs should therefore face a significant burden of production before an inference of unconstitutionality may be raised. *See Miller*, 515 U.S. at 916-17 (noting that plaintiffs' "evidentiary difficulty . . . requires courts to exercise extraordinary caution" before allowing *Shaw I* claims to go forward). Second, repeated judicial interference in congressional districting wreaks havoc on state democratic processes. Judges should demand clear evidence of a *Shaw I* violation before allowing a State to be dragged into court. *See id.* at 916-17 ("[C]ourts must . . . recognize . . . the intrusive potential of judicial intervention into the legislative realm, when assessing . . . the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed."). Third, "the presumption of good faith that must be accorded legislative enactments" weighs in favor of imposing a substantial burden of production. *Id.* at 916; *see, e.g., Illinois v. Krull*, 480 U.S. 340, 351 (1987) (legislatures are presumed to act in accord with the Constitution).

In a *Shaw I* action, plaintiffs would carry their burden of production, and thereby raise an inference of racial gerrymandering, only if they satisfied two tests. First, plaintiffs would have to make a compelling showing that the challenged district failed a functional test for geographical compactness. Second, they would have to demonstrate that the racial

demographics of the district were seriously distorted by comparison with those of neighboring districts. The evidence would constitute a *prima facie* case under *Shaw I* if, left unrebutted, it would permit a reasonable fact-finder to conclude that the State completely subordinated race-neutral districting criteria to race. Whether the proffered evidence sufficed would be a question of law for the court.

a. Plaintiffs Should Be Required to Present Compelling Evidence That a Challenged District Flunks a Functional Test for Geographical Compactness.

As a threshold matter, *Shaw I* plaintiffs should be required to present compelling evidence that a challenged district fails a functional test for geographical compactness. Functional compactness is best understood as " 'the presence or absence of a sense of community made possible by open lines of access and communication.' " *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (quoting *Wilson v. Eu*, 823 P.2d 545, 549 (Cal. 1992)), *aff'd mem.*, 515 U.S. 1170 (1995); *see Chen v. City of Houston*, 1998 U.S. Dist. LEXIS 9860, *33, *36 (S.D. Tex. 1998) (same). A functional approach thus measures the geographical compactness of a district based on such relevant indicia as actual road travel-time across the district and the existence of open lines of access and communication — the things that actually foster communities of interest in a region and facilitate interaction between representatives and constituents.

The functional test generally makes more sense in contemporary times than the traditional aesthetic and physical measures reflected in tests for "dispersion" and "perimeter" compactness. Measures of dispersion and perimeter compactness rest on the notion that the perfect district is

aesthetically pleasing and has "a regular, simple shape, usually a circle," Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 554 (1993), and that people who live in close physical proximity are likely to share interests worthy of common representation, *see id.* at 501 ("A principal aim of territorial districting is to facilitate the representation and interests of political communities. Compact districting is at best a proxy for this goal . . . ."). When travel and communication over long distances were difficult, people who lived close to one another might well have been presumed to share common interests, and legislatures and courts might reasonably have assumed that the best way to ensure representation based on actual interests was to minimize physical distance between people in a single district. But in the modern world, "there is no necessary logical relation between [dispersion and perimeter] compactness" and the representation of shared interests. Bruce Cain, *The Reapportionment Puzzle* 43 (1984). Nor is there necessarily an empirical relationship between the two. *See id.* at 43-50; Steven A. Light, *Too (Color)Blind to See: The Voting Rights Act of 1965 and the Rehnquist Court*, 8 Geo. Mason U. Civ. Rts. L.J. 1, 34 (1997) (criticizing *Miller* for presuming that "physical proximity . . . is a legitimate proxy for real communities of interest").[5]

Indeed, strict adherence to physical proximity can be an impediment to providing representation to genuine communities

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5. *See also Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (1992) (per curiam) (recognizing imperfect correlation between "geographical propinquity and community of interests"); Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 Va. L. Rev. 461, 475 (1997) (describing "imperfect nexus between geographically compact districts and communities of interest").

of interest "because there are real-life situations in which one does not have to travel very far . . . before encountering [differences in] attitudes." Cain, *supra*, at 39; *see Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (1992) (per curiam). The world is getting smaller, and communities of interest may legitimately cross street blocks, neighborhoods, and cities in ways that would have been unthinkable just decades ago.

> [T]he focus on geographic proximity in districting developed in a time when communities were smaller and transportation was more difficult. The concept of geographical coherence may be far less relevant in defining primary communities of interest in today's society. The census demographic data reveal a highly fluid society in which changes of residence are far from unexpected, and in which the growth of "exurbs" — defined by proximity to the highway networks — have replaced any pre-existing sense of geographic coherence.

T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 Mich. L. Rev. 588, 637 (1993) (internal quotation marks omitted); Paul A. Jargowsky, *Metropolitan Restructuring and Urban Policy*, 8 Stan. L. & Pol'y Rev. 47, 48 (1997) (discussing decentralization of urban areas facilitated by "high-speed, high-volume networked communications").

In addition, the presumed correlation between physical proximity of district residents and ease of access to legislators, *see Prosser*, 793 F. Supp. at 863 ("Compactness and contiguity . . . reduce travel time and costs, and therefore make it easier for candidates . . . to campaign . . . and once elected to maintain close and continuing contact with the people they represent."), may have been valid in the past, but there are fewer reasons to have faith in the connection now.

> The popular concern for compactness . . . is the legacy of earlier periods in history when communications and transportation were difficult. Compactness guaranteed that representatives could meet with their constituents with relative ease . . . . This consideration is not as relevant as it once was. Travel over large and sprawling areas is no longer a formidable task.

Cain, *supra*, at 32; *see* Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 U.C.L.A. L. Rev. 1, 22 (1985).

In sum, courts deciding whether *Shaw I* plaintiffs have produced compelling evidence that a district is not geographically compact should rely on functional measures rather than on aesthetic or physical criteria.[6] In today's world, functional measures do the job that shape was supposed to do —only they do it better. Plaintiffs therefore should not be able to raise an inference of purposeful discrimination with nothing more than evidence of a district's irregular shape. A *prima facie Shaw I* case should require proof that a challenged district fails a functional test for compactness.[7]

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6. States are not constitutionally required to draw districts that are aesthetically pleasing. *See Vera*, 517 U.S. at 962 (plurality opinion); *Shaw I*, 509 U.S. at 645-46.

7. *See* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. Rev. 77, 89 (1985) ("[T]he usefulness of requiring that districts be compact has been vastly overrated."); Cain, *supra*, at 148 (distorted shapes do not necessarily indicate gerrymandering and "the observer has to look closely to see what the intent was").

b. Plaintiffs Should Also Be Required to Present Compelling Evidence That a Challenged District Seriously Distorts the Region's Racial Demographics.

In addition to providing compelling evidence that a district is not functionally compact, a plaintiff seeking to raise a *Shaw I* claim solely on the basis of circumstantial evidence should be required to prove that a challenged district seriously distorts the racial demographics of the region. Where, as here, the challenged district is not majority-minority, that burden should be all the more difficult to meet. Indeed, the fact that a congressional district is not majority-minority might well support a presumption that race did not dominate legislative decision-making. Plaintiffs who could not overcome such a presumption would not establish a *prima facie* case under the framework proposed here.

2. If Plaintiffs Satisfy Their Production Burden, Defendants Must Produce Evidence That Race Was Not the Predominant Motive, with Plaintiffs Retaining the Ultimate Burden of Proving Unconstitutionality.

If plaintiffs were able to meet the difficult burden of raising an inference of *Shaw I* liability, the state would be required to proffer race-neutral reasons for the district's lines. The universe of legitimate rationales is quite large and includes "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests." *Miller*, 515 U.S. at 916. Producing such evidence would be sufficient to rebut the inference of unconstitutionality established by plaintiffs' evidence and shift the production burden back to plaintiffs. With plaintiffs' and defendants' positions so framed, plaintiffs would then attempt to meet their demanding burden

of proving that racial considerations dominated the districting process.

3. When Plaintiffs Cannot Carry Their Burden of Proof, Courts Should Defer to the Legislature's Line-Drawing Judgments.

If Plaintiffs cannot meet the difficult burden of proving that race was the predominant legislative motive under the framework recommended here, the judiciary must defer to North Carolina's judgments about how best to structure its democracy. A state's ultimate goal in legislative apportionment is to provide effective political representation of the interests of its citizens. In doing so, a state necessarily makes difficult and contested political judgments as to what interests should be represented in Congress, and how.[8] For this reason, "[e]lectoral districting is a most difficult subject for legislatures, and . . . the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915; *see Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) ("Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious,

8. The question of how best to represent the interests of citizens is the subject of considerable and reasonable debate. *See, e.g.*, Keith J. Bybee, *Mistaken Identity: The Supreme Court and the Politics of Minority Representation* 36-50 (1998); Malone, *supra*, at 475-92; Hanna Fenichel Pitkin, *The Concept of Representation* (1967). Thus, members of this Court have criticized judicial interference in matters of legislative apportionment on the ground that it requires courts to make theoretical judgments concerning the nature of political representation — judgments that courts are often ill-equipped to make. *See, e.g., Holder v. Hall*, 512 U.S. 874, 891-903 (1994) (Thomas, J., concurring); *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting); *Wesberry v. Sanders*, 376 U.S. 1, 30 (1964) (Harlan, J., dissenting).

ethnic, racial, occupational, and socioeconomic groups."); Lowenstein & Steinberg, *supra*, at 26-38, 73-75 (congressional districting is inherently political and should be free from excessive judicial interference).[9]

Moreover, judicial interference seems especially inappropriate where, as here, the majority "attempt[s] to enable the minority to participate more effectively in the process of democratic government," *Shaw II*, 517 U.S. at 918 (Stevens, J., dissenting), rather than to exclude minorities from democratic participation. In these cases, there is little reason to believe that democratic processes are being unconstitutionally subverted and thus no need for courts to enter the "political thicket" of legislative apportionment. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

II.

THE DISTRICT COURT IMPROPERLY RELIEVED PLAINTIFFS OF THEIR DEMANDING BURDEN OF PROOF.

Within the framework recommended here, Plaintiffs failed to make even a *prima facie* showing that race was the

9. Of course, federal law limits the States' districting authority in important ways. *See, e.g., Davis*, 478 U.S. at 113 (holding that claims of partisan gerrymandering are justiciable); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (prohibiting vote dilution); *Baker v. Carr*, 369 U.S. 186 (1962) (requiring equality of district population); *Gomillion*, 364 U.S. at 341 (prohibiting redrawing district lines to intentionally deprive citizens of right to vote on basis of race). But these rules leave the states with considerable leeway. For example, even after application of the "one person one vote" principle, hundreds of districting options remain available to the states. *See* Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts, in Representation and Redistricting Issues* 7-8 (Bernard Grofman et al. eds., 1982).

predominant factor motivating the State's districting decision. Moreover, even assuming that their weak evidence raised an inference of unconstitutionality, North Carolina fully countered that inference with unchallenged evidence that non-racial motives dominated the State's districting process. Given the unrebutted evidence of dominant non-racial motives, the district court should have awarded summary judgment to Defendants. The district court thus clearly erred in granting summary judgment to Plaintiffs.

A. Applying the Appropriate Framework, Plaintiffs Failed to Meet Their Substantial Burden of Demonstrating That Race Was North Carolina's Predominant Purpose in Redistricting.

1. Plaintiffs' Circumstantial Evidence Failed Even to Raise an Inference of Discriminatory Purpose.

In granting summary judgment to Plaintiffs, the district court improperly relied on weak circumstantial evidence of insufficient geographic compactness and distorted demographics. Looking first to demographics, the court found that District Twelve, which is composed of parts of six split counties, received "almost 75 percent" of its population from "three county parts which are a majority African-American in population," while "the other three county parts . . . have narrow corridors which pick up as many African-Americans as are needed for the district to reach its ideal size." *Cromartie v. Hunt*, No. 4:96-CV-104-BO (3) (E.D.N.C. April 14, 1998), Appendix to Jurisdictional Statement ("Appendix") at 6a-7a. The court further found that "the four largest cities assigned to District 12 are split along racial lines." *Id.* at 7a. Moving onto compactness, the district court found that "District 12 has an irregular shape," *id.* at 9a, that the district's dispersion and perimeter compactness measures "are much lower than the mean

compactness indicators for North Carolina[]," *id.* at 11a, and that "it is still the most geographically, (sic) scattered of North Carolina's congressional districts," *id.* at 20a. Also, the count found that the district was "barely contiguous in parts." *Id.* at 9a. Thus the court concluded, on the basis of what it termed the undisputed evidence, that District Twelve, like its predecessor, was "unusually shaped . . . wind[ing] its way from Charlotte to Greensboro along the Interstate-85 corridor, making detours to pick up heavily African-American parts of [other] cities." *Id.* at 19a.

This evidence was plainly insufficient to raise an inference that race was the General Assembly's predominant motivating factor. First of all, District Twelve is a majority-white district: just 46.67% of its total population and 43.36% of its voting age population is black. Surely, if North Carolina was hell-bent on subordinating all other factors to race, it would not have drawn district lines that so reduced the probability of electing a black representative. But even if the Court does not believe that District Twelve's majority-white population is dispositive of the issue of the General Assembly's predominant purpose,

> the fact that all of North Carolina's congressional districts [have a] majority-white [voting-age population] at the very least makes the plaintiffs' burden, which is already quite high, even more onerous.

Id. at 31a (Ervin, J., dissenting); *see Lawyer*, 117 S. Ct. at 2195.

Second, District Twelve is "not so bizarre or unusual in shape" as to raise an inference of racial gerrymandering. *Cromartie*, Appendix at 25a (Ervin, J., dissenting). District

Twelve is among the most functionally compact in North Carolina. It has the third shortest travel time and distance between its farthest points of any district in North Carolina. *See* Affidavit of Dr. Alfred W. Stuart, Appendix at 105a. Also, Interstate-85 forms a major artery of access and communication through the district. And although District Twelve does not score well on tests of dispersion and perimeter compactness, it is fully contiguous and is significantly more compact based on these measures than its predecessor. *See* "An Evaluation of North Carolina's 1998 Congressional District" by Professor Gerald R. Webster ("Webster Report"), Appendix at 127a, 133a.

Thus, Plaintiffs' circumstantial evidence of racial demographics and geographical compactness was insufficient to justify an inference that North Carolina had used race as the predominant factor in drawing district lines. Moreover, as is shown below, any inference of impermissible racial gerrymandering raised by this record was fully rebutted by Defendants' evidence.

2. Defendants Fully Rebutted Any Inference That Race Was the Predominant Factor in the Districting Process.

Even assuming, *arguendo*, that Plaintiffs' circumstantial evidence was sufficient to raise an inference of unconstitutionality, Defendants fully rebutted that inference with unchallenged proof that race was not the predominant consideration in the drawing of District Twelve's boundaries. Inexplicably, the bulk of this evidence was completely ignored by the district court. The Chairmen of both the State House of Representatives' Redistricting Committee and the State Senate's Redistricting Committee submitted affidavits affirming that ensuring a particular racial balance was not the General Assembly's primary motivation in drawing District

Twelve. *See* Affidavit of Senator Roy A. Cooper, III ("Cooper Affidavit"), Appendix at 70a-78a; Affidavit of Representative W. Edwin McMahan ("McMahan Affidavit"), Appendix at 79a-84a. Similarly, North Carolina's submission to the Department of Justice pursuant to section 5 of the Voting Rights Act indicated that the "General Assembly's primary goal in redrawing the plan was to remedy the constitutional defects of the former plan," that is, to ensure that race was *not* the predominant factor. *See* Affidavit of Gary O. Bartlett, ¶ 97C-27N of the Section 5 Submission Commentary ("Bartlett Affidavit"), Appendix at 63a. According to its submission, the General Assembly declined to create a majority-minority Twelfth District because to do so "would artificially group together citizens with disparate and diverging economic, social and cultural interests and needs" and would thereby make "race . . . the predominant factor." *Id.* at 66a. Plaintiffs offered no contrary direct evidence of Defendants' motivations.

In addition, the Defendants offered extensive evidence that the North Carolina General Assembly created District Twelve in order to provide representation to communities of actual shared interests. *See* Bartlett Affidavit, Appendix at 64a; Webster Report, Appendix at 1 (noting "desire to include a requisite number of people with similar social, economic or political orientations" in a single district). States may legitimately consider communities of interests when drawing congressional districts, s*ee Shaw II*, 517 U.S. at 907; *Miller*, 515 U.S. at 919, and North Carolina's reliance on these criteria easily explain District Twelve's shape and demographics.[10]

10. A district providing representation for actual communities of interest will not necessarily be physically compact. *See supra* Point I.C.1.a. In addition, a district's discernible racial character will often be caused by the demonstrated correlations between race and actual communities of interest. *See Vera*, 517 U.S. at 964 (plurality opinion) (Cont'd)

North Carolina explicitly identified three communities of interest that readily explain the shape and racial composition of District Twelve. First, in order to maintain the House delegation's six-six partisan balance, the General Assembly included precincts in District Twelve that had supported democratic candidates in recent elections. *See* Bartlett Affidavit, Appendix at 64a. Maintaining such a balance was necessary to ensure compromise between the Republican-controlled State House of Representatives and the Democrat-controlled State Senate, and this in turn required placing District Twelve's Democratic incumbent (as well as the other eleven incumbents) in "safe" districts. *See* Cooper Affidavit, Appendix at 71a-75a, 77a; McMahan Affidavit, Appendix at 81a-83a; Affidavit of David Peterson, Ph.D., Appendix, at 85a-100a. District Twelve's large black population is thus the result of the voting patterns of black North Carolinians, who overwhelming support Democratic candidates. *See* Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1998*, 1052 (1998).

Though the district court at least acknowledged this evidence, it failed to credit it, relying instead on anecdotal evidence that "the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District." *Cromartie*,

(Cont'd)
("[R]ace [often] correlates strongly with manifestations of community of interest . . . ."); *Abrams*, 117 S. Ct. at 1947 (Breyer, J., dissenting) (noting that rural and urban minorities living near one another may share common interests). In this regard, it is imperative that courts recognize that when a group of minority citizens organizes itself and lobbies a state legislature for representation in Congress, the legislature's assent to that lobbying is properly ascribed to political, rather than racial, motivations. It would be a travesty of the Equal Protection Clause (and the First Amendment) for this Court to prevent racial minorities from organizing and advocating for themselves in the political arena when every other self-defined interest group is permitted to do so.

Appendix at 20a. From this, the court inferred that politics was simply a pretext for race. However, as Judge Ervin noted in dissent:

> This evidence does not take into account . . . that voters often do not vote in accordance with their registered party affiliation. The State has argued, and I see no reason to discredit their uncontroverted assertions, that the district lines were drawn based on votes for Democratic candidates in *actual elections*, rather than the number of registered voters.

Id. at 33a (Ervin, J., dissenting); Cooper Affidavit, Appendix at 73a ("election results [from 1990-1996] were the principal factor"). The decision to rely on voting rather than registration was perfectly legitimate, *see Vera*, 517 U.S. at 968 (plurality opinion), particularly given the documented history of white registered North Carolina Democrats voting Republican to avoid electing black candidates. *See Gingles v. Edmisten*, 590 F. Supp. 345, 367-72 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom., Thornburg v. Gingles*, 478 U.S. 30 (1986). By rejecting Defendants' evidence, the district court therefore improperly substituted its judgment for that of the legislature as to the appropriate criterion of partisanship.

Second, the district court completely ignored Defendants' evidence that the General Assembly sought to provide representation to inner-city residents. District Twelve is "a functionally compact, highly urban district drawing together citizens in Charlotte and the cities of the Piedmont Urban Triad." Cooper Affidavit, Appendix at 74a; *see Cromartie*, Appendix at 36a-37a (Ervin, J., dissenting) ("I do not see how anyone can argue that the citizens of, for example, the inner-city of Charlotte do not have more in common with citizens of

the inner-cities of Statesville and Winston-Salem than with their fellow Mecklenburg county citizens who happen to reside in the suburban or rural areas."). A State may reasonably seek to provide effective representation to inner-city urban communities. *See Lawyer*, 117 S. Ct. at 2195; *Vera*, 517 U.S. at 966 (plurality opinion).

Third, the district court failed to consider evidence that North Carolina sought to join in one district the very real community of interests formed by localities abutting Interstate 85, a major line of communication, transportation, and commerce for the culturally distinct Charlotte/Piedmont triad region. In North Carolina, as in other states, residence in proximity to a major transportation artery links people into natural voting constituencies. *See Cromartie*, Appendix at 36a (Ervin, J., dissenting) ("District 12 also was designed to join a clearly defined 'community of interest' that has sprung up among the inner-cities and along the more urban areas abutting the interstate highways that are the backbone of the district."); Webster Report, Appendix at 124a (recognizing appropriateness of "focus[ing] . . . upon major transportation corridors such as freeways"); *Vera*, 517 U.S. at 966 (plurality opinion) (noting that "transportation lines . . . implicate traditional districting principles"). Furthermore, by focusing the district on Interstate 85, the General Assembly fostered ease of access to legislators. *See* Affidavit of Dr. Alfred W. Stuart, Appendix at 105a; Webster Report, Appendix at 125a.

Indeed, this Court in *Abrams*, 117 S. Ct. at 1941, *aff'g*, *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995), approved the court-drawn Eleventh Congressional District in Georgia, which the lower court had described as "a relatively compact grouping of counties which follow a suburban to rural progression and have Interstate Eighty-Five as a very real connecting cable." *Johnson*, 922 F. Supp. at 1564. Thus, this

Court has previously recognized the legitimate role that Interstate 85 can play in creating communities of interest worthy of representation. If Interstate 85 forms a legitimate locus for the 11.79% black Eleventh District in Georgia, then North Carolina may legitimately determine that the same highway plays a similar role in North Carolina's Twelfth District. Defendants' non-racial explanations therefore fully rebutted whatever inference of discrimination may have been raised by Plaintiffs' weak circumstantial evidence of District Twelve's shape and racial demographics.

B. The District Court Relieved Plaintiffs of Their Difficult Burden of Proof By Relying on Impact, Rather Than Intent, to Find a Constitutional Violation.

Given the weakness of Plaintiffs' circumstantial showing and the overwhelming strength of Defendants' rebuttal, the district court erred in failing to grant summary judgment to Defendants and in granting summary judgment to Plaintiffs. The district court effectively erected a conclusive presumption of purposeful discrimination on the basis of flimsy, completely rebutted circumstantial evidence. For all practical purposes, the district court shifted the burden of proof from Plaintiffs to Defendants and improperly created an impact test for *Shaw I* cases brought by white voters. *But see, e.g., Gomillion*, 364 U.S. at 341 (representing the rare case where the effects of governmental action were so overwhelming that the racial purpose of the action was clear).

Once the proper burden of proof rules are applied, however, it is clear that the district court erred in failing to grant Defendants' motion for summary judgment. Defendants are entitled to summary judgment as a matter of law where, as here, plaintiffs make an insufficient showing on an essential element of their case as to which they bear the burden of proof. *See*

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In opposing a summary judgment motion, plaintiffs may not rest on the pleadings, but must indicate, by affidavits or otherwise, "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Moreover, plaintiffs may not simply assert the existence of a factual dispute. "If the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

Furthermore, in considering the sufficiency of plaintiffs' showing, the court "must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 254. To successfully oppose a summary judgment motion, plaintiffs who bear a heightened burden of proof at trial must present sufficient evidence to allow a trier of fact to find in their favor under the heightened standard. *See id.* at 252-53; *Miller*, 515 U.S. at 916 (noting that in *Shaw I* actions, courts are directed to consider heightened burden "when assessing . . . the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed") (citing *Celotex*, 477 U.S. at 327).

Applying these standards, Defendants were plainly entitled to a grant of summary judgment. *See Cromartie*, Appendix at 43a (Ervin, J., dissenting). Plaintiffs failed to offer specific and significantly probative evidence sufficient to create a genuine issue of fact as to whether racial considerations dominated the General Assembly's districting decisions to the exclusion of other factors. *See Crawford-el v. Britton*, 118 S. Ct. 1584, 1598 (1998) ("[P]laintiff may not respond [to defendant's summary judgment motion] simply with general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has

carried his or her burden of proving the pertinent motive."); 10B Wright, Miller & Kane, *Federal Practice & Procedure: Civil 3d* § 2730, at 40-42 (1998) (same). Unlike in every previous case striking down a challenged district under *Shaw I*, Plaintiffs offered, and could offer, no direct evidence that race dominated any legislator's considerations, much less the considerations of the General Assembly as a whole. In contrast, Defendants offered extensive direct evidence that traditional districting criteria were not subordinated to race. In the face of Defendants' unrebutted evidence, Plaintiffs' circumstantial evidence simply could not create a genuine issue of fact as to legislative purpose and therefore could not defeat Defendants' motion for summary judgment. *See Miller*, 515 U.S. at 914 (evidence of discriminatory impact usually insufficient to demonstrate discriminatory purpose, requiring courts to look to other evidence); 10A Wright, Miller, & Kane, *supra*, § 2727, at 470-71, 486-88, 501.

Incredibly, the district court not only failed to award summary judgment to Defendants, it granted Plaintiffs' summary judgment motion. This was manifest error for two reasons. First, the district court applied an improper standard for considering evidence on a motion for summary judgment. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255; *accord Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992). Although Defendants offered extensive evidence conclusively demonstrating that race was not the predominant consideration, the district court ignored most of that evidence. And what evidence the district court did consider, it mischaracterized. *See supra* Point II.A.2.

Second, the district court improperly granted summary judgment to the Plaintiffs on the question of North Carolina's motivations in drawing its congressional districts. In light of

the sworn statements of the Chairmen of the House and Senate Redistricting Committees that race was simply one of many factors guiding the drawing of District Twelve, and given that Plaintiffs offered no direct evidence to the contrary, the court could not legitimately have determined, as a matter of law, that Plaintiffs had conclusively demonstrated that the General Assembly acted with an impermissible purpose. *See White Motor Co. v. United States*, 372 U.S. 253, 259 (1963) (court should be wary of granting summary judgment where dispositive issue requires assessment of state of mind); *Johnson v. Meltzer*, 134 F.3d 1393, 1397-98 (9th Cir. 1998) (same). At a minimum, this Court should remand the case for fact-finding as to whether race was, indeed, the legislature's predominant concern. *See Crawford-el*, 118 S. Ct. at 1597 (credibility assessments are not amenable to resolution on summary judgment); *Agosto v. INS*, 436 U.S. 748, 756 (1978) ("[A] district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented.").

By awarding summary judgment to Plaintiffs on the basis of the district's shape and racial demographics despite extensive evidence that its shape and demographics could be explained through North Carolina's application of traditional, race-neutral districting factors, the district court effectively held that *Shaw I* plaintiffs could raise a conclusive presumption of predominant racial purpose solely on the basis of circumstantial evidence. In effect, the district court's decision, if permitted to stand, would premise government liability on the basis of perceived "discriminatory impact," at least for white plaintiffs challenging "too black" districts. The court's ruling was contrary to long-established principles of constitutional law and must be reversed.

CONCLUSION

Amici respectfully urge this court to reverse the judgment below, and to hold that Plaintiffs failed to satisfy their production burden on the issue of whether race was the predominant motive in drawing District Twelve. In the alternative, *amici* ask the Court to vacate the judgment below and remand with instructions that the district court conduct a factual inquiry into North Carolina's predominant purpose. Finally, even if Plaintiffs established as a matter of law that race was the predominant factor in districting, remand still would be necessary to resolve the fact-intensive question whether District Twelve is narrowly tailored to achieve a compelling state interest. *See King v. State Bd. of Elections*, 979 F. Supp. 619, 621-27 (1997) (finding that Illinois' Fourth Congressional District satisfies strict scrutiny), *aff'd mem.*, 118 S. Ct. 877 (1998).

Respectfully submitted,

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